

In the Supreme Court of the United States

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF KEW GARDEN HILLS,
AGUDATH ISRAEL OF MADISON, RABBI YISROEL REISMAN,
AND STEVEN SAPHIRSTEIN,

Applicants,

v.

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK,

Respondent.

**On Emergency Application for Writ of Injunction to the Honorable
Stephen G. Breyer, Associate Justice of the United States Supreme
Court and Acting Circuit Justice for the Second Circuit**

**BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT
AND IN OPPOSITION TO EMERGENCY APPLICATION
FOR WRIT OF INJUNCTION**

RICHARD B. KATSKEE
ALEX J. LUCHENITSER
Counsel of Record
SARAH R. GOETZ
*Americans United for
Separation of Church and
State*
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

Counsel for Amici Curiae

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N.Y. Dep’t of Health, Interim Guidance for Gyms & Fitness Centers During the Covid-19 Public Health Emergency (Aug. 17, 2020), https://on.ny.gov/3n5lGup	17

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N.Y. Dep’t of Health, Interim Guidance for Hair Salons and Barbershops During the Covid-19 Public Health Emergency (July 1, 2020), https://on.ny.gov/35PzrFG	17
N.Y. Dep’t of Health, Interim Guidance for In-Person Instruction at Pre-K to Grade 12 Schools During the Covid-19 Public Health Emergency (Aug. 26, 2020), https://on.ny.gov/3kNIqgK	19
N.Y. Dep’t of Health, Interim Guidance for Low-Risk Indoor Arts & Entertainment During the Covid-19 Public Health Emergency (June 23, 2020), https://on.ny.gov/3cIPmbQ	17
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Minyvonne Burke, <i>More than 100 Coronavirus Cases and 3 Deaths Linked to North Carolina Church Event</i> , NBC News (Oct. 23, 2020), https://nbcnews.to/3kyjNEN	9
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Sara Cline, <i>Church Tied to Oregon’s Largest Coronavirus Outbreak</i> , AP (June 16, 2020), https://bit.ly/2YWFIT1	9, 10
Kate Conger et al., <i>Churches Were Eager to Reopen; Now They Are Confronting Coronavirus Cases</i> , N.Y. Times (July 10, 2020), https://nyti.ms/30BOhgq	12
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Chris Epp, <i>‘I Would Do Anything for a Do-Over’: Calgary Church Hopes Others Learn from Their Tragic COVID-19 Experience</i> , CTV News (May 11, 2020), https://bit.ly/3dLUv2l	12
Hilda Flores, <i>One-Third of COVID-19 Cases in Sac County Tied to Church Gatherings, Officials Say</i> , KCRA (Apr. 1, 2020), https://bit.ly/2XlCpPu	10
Eric Grossarth, <i>Idaho Falls Church Revival Leads to 30 Confirmed or Probable Cases of Coronavirus</i> , Idaho Statesman (June 4, 2020), https://bit.ly/3hZQnyI	10

TABLE OF AUTHORITIES—continued

	Page(s)
Allison James et al., <i>High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020</i> , 69 Morbidity & Mortality Wkly. Rep. 632 (2020), https://bit.ly/3f6MYM2	10
Johns Hopkins Bloomberg Sch. of Pub. Health Ctr. for Health Sec., Public Health Principles for a Phased Reopening During COVID-19: Guidance for Governors (Apr. 17, 2020), https://bit.ly/2CKc5qz	18
Lauren Leatherby, <i>United States Records Its Worst Week Yet for Virus Cases</i> , N.Y. Times (Oct. 30, 2020), https://nyti.ms/2HOP2Ng	3
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Bailey Loosemore & Mandy McLaren, <i>How a Church Revival in a Small Kentucky Town Led to a Deadly Coronavirus Outbreak</i> , Louisville Courier-Journal (Apr. 3, 2020), https://bit.ly/2V1Jjrs	10
Wyatt Massey, <i>Church of God Denomination Facing Significant COVID-19 Outbreak; Leaders Won't Say How Many Infected</i> , Chattanooga Times Free Press (July 7, 2020), https://bit.ly/3bTiWLl	10
Nakia McNabb, <i>At Least 18 West Virginia Covid-19 Outbreaks Linked to Church Services, Governor Says</i> , CNN (Oct. 19, 2020), https://cnn.it/31CLODY	9
Rachel Needham, <i>Anatomy of an Outbreak: New Documents Reveal a Significant Number of the County's COVID-19 Cases Can Be Traced to Castleton Church</i> , Rappahannock News (Sept. 1, 2020), https://bit.ly/33hLAlG	10
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Richard Read, <i>A Choir Decided to Go Ahead with Rehearsal; Now Dozens of Members Have COVID-19 and Two Are Dead</i> , L.A. Times (Mar. 29, 2020), https://lat.ms/2yiLbU6	12

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	Page(s)
Lee Roop, <i>A Small Alabama Church Had a Revival and Now 40 People Have Coronavirus</i> , AL.com (July 27, 2020), https://bit.ly/2Ekzsav	10
Joe Severino, <i>COVID-19 Tore Through a Black Baptist Church Community in WV; Nobody Said a Word About It</i> , Charleston Gazette-Mail (May 2, 2020), https://bit.ly/2SFVYyX	11
Renyi Zhang et al., <i>Identifying Airborne Transmission as the Dominant Route for the Spread of COVID-19</i> , 117 PNAS 14,857 (2020), https://bit.ly/2HTGSnf	11

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INTERESTS OF THE *AMICI CURIAE*¹

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They believe that the right to worship freely is precious and should never be misused to cause harm.

Amici include religious organizations that recommend against holding in-person worship at this time, even if allowed under state law, as many of their constituent members (including congregations and faith leaders) recognize that doing so under current conditions is dangerous. The religious organizations among *amici* know from long experience that in-person religious services inherently entail close and sustained human interactions that present substantial risks of COVID-19 transmission—not only to congregants, but also to people in the wider community. Measures that help control the pandemic now will aid religious exercise by enabling safe resumption of regular worship services sooner. Applying to religious services religion-neutral restrictions that govern all large gatherings protects the public health and respects the Constitution.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

The *amici* are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- General Synod of the United Church of Christ.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT²

The country is in the midst of a devastating pandemic. More than 247,000 Americans, including more than 34,000 New Yorkers, have died from COVID-19. See *COVID-19 Dashboard*, Ctr. for Sys. Sci. & Eng'g at Johns Hopkins Univ. (last visited Nov. 16, 2020), <https://bit.ly/31VrTAa>. There is increasing evidence that a substantial proportion of people who survive the disease suffer serious, long-term damage to their health. See, e.g., T.Y.M. Leung et al., *Short- and Potential Long-term Adverse Health Outcomes of COVID-19: A Rapid Review*, 9 *Emerging Microbes & Infections* 2190 (2020), <https://bit.ly/3ikjBXJ>. And across the country, the rates of infection are surging higher than ever. See, e.g., Lauren Leatherby, *United States Records Its Worst Week Yet for Virus Cases*, N.Y. Times (Oct. 30, 2020), <https://nyti.ms/2HOP2Ng>.

In response to this ongoing public-health emergency, New York's governor issued an Executive Order that restricts gatherings by establishing capacity limits based on the severity of the outbreak in different geographical areas. Similar restrictions on gatherings have been successful in slowing the transmission of the virus. See, e.g., Timothy Bella, *Places Without Social Distancing Have 35 Times More Potential Coronavirus Spread, Study Finds*, Wash. Post (May 15, 2020), <https://wapo.st/2EKDjhd>. And though New York's Order restricts the size of worship services, nonreligious gatherings are restricted to a greater extent.

² This brief is substantially similar to the brief submitted by the same *amici* in *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (docketed Nov. 12, 2020). The primary differences are in the factual discussion in Part B.2.

Applicants nevertheless seek a broader religious exemption from the Order under the Free Exercise Clause of the First Amendment. But this Court has never mandated a religious exemption when doing so would inflict substantial harm on people beyond the individual or entity invoking the Clause. Exempting religious gatherings from New York's Order would do exactly that: A contagious person at a religious service could infect fellow congregants, who may then expose family, friends, and strangers, including numerous people who did not attend the event.

Nor has this Court ever concluded that there was discrimination against religion in violation of the Free Exercise Clause when government drew distinctions that were based not on hostility to religion but on legitimate, objective, secular criteria. New York has not acted with antireligious animus here. On the contrary, New York's Order restricts religious gatherings *less* than comparable nonreligious gatherings. And as the district court found, New York has legitimate, science-based reasons for treating large gatherings such as worship services, lectures, and concerts differently from operation of grocery stores and factories.

The Court should not deviate from these settled principles of free-exercise law, particularly in the context of a request for an emergency injunction, when the Court does not have full merits briefing and the opportunity to give due consideration to the legal questions in the normal course. Not only would granting the injunction that applicants request inflict great harm on the many people who would become ill and die as a result, but this misuse of the precious right of religious freedom would also

harm religious institutions, their congregants, and religion in general by linking them with, and causing them to be blamed for, avoidable suffering and death.

ARGUMENT

A. The Free Exercise Clause does not require a religious exemption here because granting one would gravely harm numerous people.

1. *This Court has never granted an exemption under the Free Exercise Clause when doing so would inflict substantial harm on people beyond the applicant.*

The freedom to worship is a value of the highest order; and many people naturally seek the comfort and support provided by faith communities in these difficult times. But as this Court recently reaffirmed, the constitutional guarantee of religious freedom “does not mean that religious institutions enjoy a general immunity from secular laws.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). For “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988).

The Court has thus repeatedly rejected free-exercise claims for religious exemptions that would impose significant harms on third parties. In *United States v. Lee*, for example, the Court denied an Amish employer’s request for an exemption from paying Social Security taxes because the exemption would have “operate[d] to impose the employer’s religious faith on the employees.” 455 U.S. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with “an economic advantage over their competitors who must remain closed on that day.” 366 U.S. 599, 608–609

(1961) (plurality opinion). And in *Prince v. Massachusetts*, the Court denied a request for an exemption from child-labor laws to allow distribution of religious literature by minors, because while “[p]arents may be free to become martyrs themselves * * * it does not follow [that] they are free, in identical circumstances, to make martyrs of their children.” 321 U.S. 158, 170 (1944). In short, as Justice Jackson separately explained in *Prince*, “the limits [on religious exercise] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.” *Id.* at 177 (Jackson, J., concurring in the judgment).

In keeping with this jurisprudence, the Court has repeatedly acknowledged that there is no right to religious exemptions from laws that, like New York’s Order, shield the public from illness. More than a century ago, in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court explained that “[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] * * * regardless of the injury that may be done to others.” See *id.* at 26. The Court straightforwardly rejected the view that the Constitution bars compulsory measures to protect health, recognizing instead the “fundamental principle” that personal liberty is subject to restraint “in order to secure the * * * health * * * of the state.” *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). Because “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members,”

individual rights are defined and conditioned so as to ensure that government may implement reasonable restrictions to protect the public health. *Id.* at 27.

Although *Jacobson* did not specifically consider a Free Exercise Clause argument, perhaps because the Clause was not then applicable against the States, several of the Court's subsequent decisions have recognized that the principles of the case apply in the free-exercise context as in all others. In *Prince*, for example, the Court explained that one "cannot claim freedom from compulsory vaccination * * * on religious grounds." 321 U.S. at 166. For the "right to practice religion freely does not include liberty to expose the community * * * to communicable disease." *Id.* at 166–167. In *Sherbert v. Verner*, 374 U.S. 398, 402–403 (1963), the Court, citing *Jacobson* and *Prince*, noted that it "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" when "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." And in *Wisconsin v. Yoder*, 406 U.S. 205, 230 & n.20 (1972), the Court illustrated the principle that free-exercise claims are denied when "harm to the physical or mental health * * * or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred," with citations to a case rejecting a free-exercise challenge to a mandatory-vaccination law (*Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644 (Ark. 1965)), a case rejecting an attempt to use the Free Exercise Clause to block a lifesaving blood transfusion (*Application of President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000, 1007–1010 (D.C. Cir. 1964) (Wright, J., in chambers)), and *Jacobson*.

Except in one special context described in the next paragraph, the Court has ruled in favor of Free Exercise Clause claimants only after confirming that no substantial harm would be imposed on others. For instance, in holding that Amish parents were entitled to an exemption from a compulsory-school-attendance law in *Yoder*, the Court explained that “[t]he record strongly indicate[d] that accommodating the religious objections of the Amish * * * will not impair the physical or mental health of the child * * * or in any other way materially detract from the welfare of society.” 406 U.S. at 234. Similarly, in holding that the Free Exercise Clause prohibited the state in *Sherbert* from denying unemployment benefits to a Seventh-Day Adventist because of her refusal to work on her Sabbath, the Court noted that its ruling would not “serve to abridge any other person’s religious liberties” (374 U.S. at 409) or otherwise significantly harm anyone (see *id.* at 406–409).

Only in cases concerning the ministerial exception—which recognize that the Establishment and Free Exercise Clauses together prohibit employment-discrimination laws from being enforced in a manner that would interfere with a church’s selection of ministerial employees—has the Court ever mandated a religious exemption that would inflict meaningful harm on nonbeneficiaries (there, the employees who lose their jobs). See *Our Lady of Guadalupe*, 140 S. Ct. at 2055; *Hosanna-Tabor Lutheran Evangelical Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). Those cases concerned core decisions of religious institutions that affect only their internal structures and the people who voluntarily choose to join them. See *Hosanna-Tabor*, 565 U.S. at 188 (“[T]he Free Exercise Clause * * * protects a

religious group’s right to shape its own faith and mission through its appointments.”). This case presents a far different question: whether there is a constitutional right to put countless people *outside* the congregation at greater risk of exposure to deadly disease.

2. *Requiring a religious exemption from New York’s Order would inflict severe harm on countless other people.*

Exempting applicants from New York’s emergency public-health measures would subject not only their congregants but also everyone with whom they come into contact—indeed, their entire communities—to serious and sometimes-fatal health risks.

Indoor gatherings that bring together large groups of people for extended periods are responsible for a substantial proportion of the spread of COVID-19. See, e.g., Christie Aschwanden, *How ‘Superspreading’ Events Drive Most COVID-19 Spread*, Sci. Am. (June 23, 2020), <https://bit.ly/2Jkx71W>. And religious gatherings, specifically, have led to numerous outbreaks and deaths. See, e.g., Nakia McNabb, *At Least 18 West Virginia Covid-19 Outbreaks Linked to Church Services, Governor Says*, CNN (Oct. 19, 2020), <https://cnn.it/31CLODY>; Kaitlin McKinley Becker, *More Than 200 COVID-19 Cases Linked to Fitchburg Church*, NBC10 Boston (Nov. 7, 2020), <https://bit.ly/2GK6Tox>; Minyvonne Burke, *More than 100 Coronavirus Cases and 3 Deaths Linked to North Carolina Church Event*, NBC News (Oct. 23, 2020), <https://nbcnews.to/3kyjNEN>; Bill Bostock, *Nearly 100 People in Ohio Got Sick After One Man Infected with the Coronavirus Attended a Church Service*, Business Insider (Aug. 6, 2020), <https://bit.ly/2Qi2eeF>; Sara Cline, *Church Tied to Oregon’s Largest*

Coronavirus Outbreak, AP (June 16, 2020), <https://bit.ly/2YWFIT1>; Hilda Flores, *One-Third of COVID-19 Cases in Sac County Tied to Church Gatherings, Officials Say*, KCRA (Apr. 1, 2020), <https://bit.ly/2XlCpPu>; Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 69 *Morbidity & Mortality Wkly. Rep.* 632 (2020), <https://bit.ly/3f6MYM2>; Stephanie Becker, *At Least 70 People Infected with Coronavirus Linked to a Single Church in California, Health Officials Say*, CNN (Apr. 4, 2020), <https://cnn.it/2NgYN6l>; Lee Roop, *A Small Alabama Church Had a Revival and Now 40 People Have Coronavirus*, AL.com (July 27, 2020), <https://bit.ly/2Ekzsav>; Eric Grossarth, *Idaho Falls Church Revival Leads to 30 Confirmed or Probable Cases of Coronavirus*, Idaho Statesman (June 4, 2020), <https://bit.ly/3hZQnyI>; John Raby, *Virus Outbreak Grows to 28 Cases at West Virginia Church*, AP (June 15, 2020), <https://bit.ly/30WTqBm>; Rachel Needham, *Anatomy of an Outbreak: New Documents Reveal a Significant Number of the County’s COVID-19 Cases Can Be Traced to Castleton Church*, Rappahannock News (Sept. 1, 2020), <https://bit.ly/33hLAlG>; Wyatt Massey, *Church of God Denomination Facing Significant COVID-19 Outbreak; Leaders Won’t Say How Many Infected*, Chattanooga Times Free Press (July 7, 2020), <https://bit.ly/3bTiWlI>; Ryan Burns, *A Redding Megachurch Leader Came to Humboldt and Flouted Mask Rules; Her Ministry Is Now the Source of a Major COVID Outbreak*, Lost Coast Outpost (Oct. 13, 2020), <https://bit.ly/3m86USb>; Bailey Loosemore & Mandy McLaren, *How a Church Revival in a Small Kentucky Town Led to a Deadly Coronavirus Outbreak*, Louisville Courier-Journal (Apr. 3, 2020), <https://bit.ly/2V1Jjrs>; Trudy Balcom,

COVID-19 Outbreak on the Navajo Nation Linked to Church Rally, White Mountain Indep. (Mar. 24, 2020), <https://bit.ly/2YSR6di>; Joe Severino, *COVID-19 Tore Through a Black Baptist Church Community in WV; Nobody Said a Word About It*, Charleston Gazette-Mail (May 2, 2020), <https://bit.ly/2SFVYyX>.

As these examples show, a single unwitting carrier at a large worship service can cause a ripple effect not just within the congregation, which alone would be tragic, but also throughout an entire community: The one infected person may pass the virus to his neighbors in the pews, who may then return home and pass it to their family members, including people at high risk of severe illness. Those infected family members may then expose others, who may do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die because of insufficient healthcare resources. The Free Exercise Clause has never been thought to require religious exemptions for conduct that threatens so much harm to so many.

It is no answer to argue that spread of the virus might be reduced to some extent through means short of restrictions on the size of gatherings, such as physical-distancing requirements and sanitation measures. Though such measures are certainly a good idea and can bolster the effectiveness of capacity restrictions, airborne transmission of COVID-19 can render even rigorous physical-distancing and cleaning measures inadequate. See, e.g., Renyi Zhang et al., *Identifying Airborne Transmission as the Dominant Route for the Spread of COVID-19*, 117 PNAS 14,857 (2020), <https://bit.ly/2HTGSnf>. Outbreaks of the virus have thus been traced to

religious gatherings that employed physical-distancing and other safety precautions. See, e.g., Shelly Bradbury, *Fatal COVID-19 Outbreak Linked to Colorado Religious Group Suing State over Limits on Gatherings*, Denver Post (Oct. 6, 2020), <https://dpo.st/3k5nHVI>; Kate Conger et al., *Churches Were Eager to Reopen; Now They Are Confronting Coronavirus Cases*, N.Y. Times (July 10, 2020), <https://nyti.ms/30BOhgq>; Lateshia Beachum, *Two Churches Reclose After Faith Leaders and Congregants Get Coronavirus*, Wash. Post (May 19, 2020), <https://wapo.st/2WQgW0x>; Alex Acquisto, *This Central Kentucky Church Reopened on May 10 and Became a COVID-19 Hot Spot*, Lexington Herald-Leader (June 6, 2020), <https://bit.ly/3dDbQdq>; Richard Read, *A Choir Decided to Go Ahead with Rehearsal; Now Dozens of Members Have COVID-19 and Two Are Dead*, L.A. Times (Mar. 29, 2020), <https://lat.ms/2yiLbU6>; Chris Epp, *'I Would Do Anything for a Do-Over': Calgary Church Hopes Others Learn from Their Tragic COVID-19 Experience*, CTV News (May 11, 2020), <https://bit.ly/3dLUv2l>.

Even when this Court subjects governmental conduct to a compelling-interest test, it does not require the state to accept “proposed alternatives” if they “will not be as effective” in achieving the state’s goal. See *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). And as the litany of examples of church-related outbreaks above reflects, permitting indoor mass gatherings with social-distancing and the like is simply not as effective at reducing the transmission of COVID-19 as is strictly limiting the size of those events. The Court should not second-guess the measures that New York has

implemented, based on scientific data and public-health expertise, to protect its residents' health and lives.

B. New York's Order does not discriminate against religion.

1. *Distinctions based on objective scientific analysis rather than religious status or animus are not religious discrimination.*

The Free Exercise Clause “protects religious observers against unequal treatment’ and against ‘laws that impose special disabilities on the basis of religious status.” *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)). Thus, the Court has recognized religious discrimination when governmental action is based on religious status or is otherwise motivated by sectarian or antireligious animus. By contrast, this Court has never held that government discriminates against religion in violation of the Free Exercise Clause when it draws distinctions and acts based on objective, secular criteria, even if its actions incidentally burden religious practice along with other regulated conduct.

For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993), the Court struck down a set of local ordinances prohibiting animal sacrifice, because they “had as their object the suppression of religion,” having been “gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings.” In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018), the Court set aside a decision of a state commission that a baker had violated a civil-rights law by refusing for religious reasons to bake a cake for a wedding of a same-sex couple, because the commission’s

statements and conduct had demonstrated “a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker’s] objection.” In *Espinoza* and *Trinity Lutheran*, the Court held that the Free Exercise Clause prohibited states from excluding religious institutions from eligibility for state funding programs “solely because of religious status.” *Espinoza*, 140 S. Ct. at 2255; accord *Trinity Lutheran*, 137 S. Ct. at 2019–2021. And in *McDaniel v. Paty*, the Court ruled that prohibiting a minister from seeking public office solely because of his status as a member of the clergy violated the Free Exercise Clause. 435 U.S. 618, 629 (1978) (plurality opinion); accord *id.* at 629–630 (Brennan, J., concurring in the judgment).

On the other hand, the Court has never concluded that there was religious discrimination or animus in violation of the Free Exercise Clause just because a law has some exemptions, drawn on objective grounds unrelated to religion, but does not also contain an exemption for religious conduct or institutions. For example, in its cases upholding Sunday-closing laws, the Court concluded that Jewish shopkeepers who must close on Saturdays for observance of their Sabbath were not entitled to a religious exemption entitling them to stay open on Sundays, even though the laws contained many exemptions—delineated on nonreligious lines—for various kinds of businesses and institutions. See *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617, 619–620, 631 (1961) (plurality opinion); *Braunfeld*, 366 U.S. at 600–601, 609 (plurality opinion); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 585 (1961). And in *Hernandez v. Commissioner*, 490 U.S. 680, 700

(1989), the Court declined to require that payments made to a religious group for spiritual-training sessions be deductible under the Internal Revenue Code, despite provisions in the Code for numerous other kinds of deductions and exemptions.

As the Court explained in *Lukumi*, “[a]ll laws are selective to some extent.” 508 U.S. at 542. Impermissible “inequality results” under the Free Exercise Clause “when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation.” *Id.* at 542–543 (emphasis added). In other words, “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens *only* on conduct motivated by religious belief.” *Id.* at 543 (emphasis added). But it can, and inevitably does, impose some burdens that affect religious practices along with other activities without being guilty of invidious religious discrimination.

2. *New York’s Order is not motivated by antireligious animus and does not discriminate against religious institutions based on status.*

Here, the distinctions in New York’s Order are based on objective public-health criteria. The Order is not motivated by religious animus. Nor does it discriminate against religious institutions or individuals based on status.

The district court here correctly rejected applicants’ allegations of animus against Orthodox Jews, finding that the boundaries of the geographical zones that are subject to heightened restrictions are based on “the epidemiological data.” App. 57; see also App. 59, 61–62, 67; *New York Micro-Cluster Strategy* (Oct. 21, 2020), <https://on.ny.gov/3mKAXzM>. And though Governor Cuomo made factual statements recognizing that the Order’s restrictions would turn out to impose significant burdens

on the Orthodox Jewish community, because the zones with the highest rates of infections include a number of locales with substantial Orthodox Jewish populations, the district court correctly found that there was “no evidence that these comments reflect an animus for those Orthodox Jewish communities or deliberate imposition of a requirement directed at thwarting the religious practices of the Orthodox Jewish community.” App. 74; see also App. 58, 66–68. Identification of virus hot spots that correlate with Orthodox Jewish communities is not evidence that the State is acting with animus toward those communities; and neither is the Governor’s recognition of unfortunate effects on them from the limitations necessary to protect the health of everyone—including, most immediately and obviously, the members of the communities themselves.

The lack of religious bias or animus is further confirmed by the provisions of the Order itself, which restrict religious services *less* than comparable nonreligious activities. In high-severity “red” zones, religious services are allowed but limited to the smaller of twenty-five percent of building capacity or ten people. See Executive Order 202.68 (Oct. 6, 2020). By contrast, all nonessential gatherings are prohibited in the red zones; all nonessential businesses are barred from conducting in-person operations; and all in-restaurant dining is prohibited. See *ibid.* In moderate-severity “orange” zones, houses of worship are permitted to hold gatherings of the lesser of one-third of building capacity or twenty-five people, while nonessential gatherings are limited to ten people, businesses such as gyms and salons continue to be prohibited from conducting in-person operations, and dining at restaurants is allowed

only outside and is limited to four people per table. See *ibid.* In precautionary “yellow” zones, houses of worship are allowed to have gatherings of up to half their building capacity, while nonessential gatherings are limited to twenty-five people, salons are limited to half capacity, gyms are limited to one-third capacity, and restaurants are limited to half capacity and prohibited from seating more than four people at a table.³ And concerts, live theatrical performances, and professional sporting events with spectators in attendance are flatly barred in all zones and indeed throughout the entire State.⁴

Applicants point out that certain retail and manufacturing businesses are not subject to the same restrictions as those that apply to houses of worship. But the State has articulated a “principled rationale for the difference in treatment” (*Masterpiece*, 138 S. Ct. at 1731)—namely, the different public-health risks posed by different categories of activities. And the district court, as factfinder, has credited the State’s rationale. App. 71–73.

Take grocery and retail stores, for example. Public-health experts have concluded that stores pose much less risk of transmission of COVID-19 than do gatherings such as worship services, in part because customers’ interactions with

³ See *ibid.*; N.Y. Dep’t of Health, Interim Guidance for Gyms & Fitness Centers During the Covid-19 Public Health Emergency 3, 5 (Aug. 17, 2020), <https://on.ny.gov/3n5lGup>; N.Y. Dep’t of Health, Interim Guidance for Hair Salons and Barbershops During the Covid-19 Public Health Emergency 3, 4 (July 1, 2020), <https://on.ny.gov/35PzrFG>; N.Y. Dep’t of Health, Interim Guidance for Food Services During the Covid-19 Public Health Emergency 3, 4 (Sept. 3, 2020), <https://on.ny.gov/2HP9qhB>.

⁴ See N.Y. Dep’t of Health, Interim Guidance for Low-Risk Indoor Arts & Entertainment During the Covid-19 Public Health Emergency 1 (June 23, 2020), <https://on.ny.gov/3cIPmbQ>; N.Y. Dep’t of Health, Interim Guidance for Professional Sports Competitions with No Fans During the Covid-19 Public Health Emergency 3 (Sept. 11, 2020), <https://on.ny.gov/3nfMPLk>.

others at stores are generally transient, while attendees at large gatherings may sit near an infectious person for long periods and thus suffer exposure to a much greater amount of the virus. See Johns Hopkins Bloomberg Sch. of Pub. Health Ctr. for Health Sec., Public Health Principles for a Phased Reopening During COVID-19: Guidance for Governors 12, 16 (Apr. 17, 2020), <https://bit.ly/2CKc5qz>. In addition, as the district court found, stores do not involve masses of individuals arriving and departing simultaneously. App. 72.

Nor are factories and offices comparable to religious services. Like retail operations, these institutions generally do not involve large groups arriving and departing together or congregating and intermingling *en masse* for long periods while speaking, singing, and chanting. See *ibid.* Moreover, factories and offices are not open to members of the public generally but instead are typically occupied by the same set of employees from day to day. Employers thus have greater control over their employees' adherence to safety and health precautions; and contact tracing in the event of an outbreak is substantially easier among a closed group of known employees. Also, factories cannot be operated remotely; and shutting down manufacturing threatens the availability of food, medication, and other goods that are themselves crucial to maintaining the public health.

Additionally, applicants point to schools' and childcare providers' being allowed to open. But schools are subject to extensive restrictions that do not apply to houses of worship, including mandatory testing of students and staff and requirements that students be kept in small cohorts that do not interact with each

other.⁵ Similarly, childcare providers are required to conduct daily health screenings of children and employees and to keep children in isolated groups of no more than fifteen.⁶ Tailoring public-health rules to the particular contexts and populations at issue is not discrimination but government doing the work that it should. Moreover, religious schools and childcare providers are subject to the same rules as their secular counterparts, further underscoring that New York’s restrictions are nondiscriminatory.

As Judge Easterbrook explained in upholding restrictions in Illinois that were similar to New York’s, “worship services * * * seem most like other congregate functions that occur in auditoriums, such as concerts and movies,” all of which “put[] members of multiple families close to one another for extended periods, while invisible droplets containing the virus may linger in the air.” *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020), *petition for cert. docketed*, No. 20-569 (Oct. 30, 2020). Because New York’s Order restricts religious worship *less* than these kinds of comparable activities, it cannot be said to discriminate against religion.

⁵ See Executive Order 202.68; *Governor Cuomo Releases Guidelines on Testing Protocol for Schools to Reopen in Red or Orange Micro-Cluster Zones* (Oct. 30, 2020), <https://on.ny.gov/36lXqMX>; N.Y. Dep’t of Health, Interim Guidance for In-Person Instruction at Pre-K to Grade 12 Schools During the Covid-19 Public Health Emergency 2 (Aug. 26, 2020), <https://on.ny.gov/3kNIqgK>.

⁶ N.Y. Dep’t of Health, Interim Guidance for Child Care and Day Camp Programs During the Covid-19 Public Health Emergency 3, 6, 7, 12–14 (June 26, 2020), <https://on.ny.gov/38OkPJO>.

CONCLUSION

If there is one belief widely held among the diverse faiths that Americans hold, it is the great value that they place on human life. *E.g.*, *Deuteronomy* 30:19–20. The precious right to worship freely should not be misapplied in a manner that contributes to the spread of disease, suffering, and death. For to do so would defeat the very purpose of that right: “The dead cannot praise the Lord.” *Psalms* 115:17.

New York has carefully drawn distinctions based on objective public-health-based considerations, while at the same time showing special solicitude—not disfavor—for religious institutions and their worship services. In doing so, the State is ensuring that after the pandemic is brought under control many more New Yorkers will be alive, healthy, and able to engage in activity that gives their lives meaning, be that worship or other pursuits. Especially in the context of an emergency proceeding such as this one, this Court should not second-guess New York’s scientifically grounded distinctions and the factual findings of the district court.

The application for an emergency injunction should be denied.

Respectfully submitted.



RICHARD B. KATSKEE
ALEX J. LUCHENITSER

Counsel of Record

SARAH R. GOETZ

*Americans United for Separation
of Church and State*

1310 L St. NW, Ste. 200

Washington, DC 20005

(202) 466-7306

luchenitser@au.org

Counsel for Amici Curiae

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